IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MORRIS and JANICE KOTOFSKY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
AMERICAN RED CROSS,	:	NO. 98-CV-3416
ALBERT EINSTEIN MEDICAL CENTER	:	
and DR. JOHN BELL-THOMPSON	:	
	:	

O'Neill, J. September , 1999

MEMORANDUM

Plaintiffs Morris and Janice Kotofsky filed this suit against the American Red Cross, the Albert Einstein Medical Center, and Dr. Bell-Thompson after Mr. Kotofsky was allegedly infected with HIV-tainted blood during a blood transfusion.[1] On November 11, 1991, Mr. Kotofsky was admitted to the Albert Einstein Medical Center where he was diagnosed by Dr. Bell-Thompson as suffering from coronary artery disease. Mr. Kotofsky signed a Consent to Transfusion of Blood and Blood Components and Release on November 13, 1991. Dr. Bell-Thompson performed triple bypass surgery on January 14, 1992.[2] Five hours after the surgery, Mr. Kotofsky received a transfusion of one unit of packed red blood cells supplied by the Red Cross. Mr. Kotofsky was diagnosed as HIV

[1]Janice Kotofsky asserts a claim for loss of consortium that is wholly derivative of Morris Kotofsky's claims and is not at issue for purposes of the present opinion. I therefore refer to Mr. Kotofsky in the singular as plaintiff in the remainder of this opinion.

[2]The complaint states that the bypass surgery took place on January 14, 1991. I am assuming, however, based on the chronology of events as described, that the surgery took place on January 14, 1992.

positive on or about June 6, 1996.

Plaintiffs allege that defendants voluntarily undertook a duty to obtain Mr. Kotofsky's informed consent to the blood transfusion. Defendants allegedly breached this duty by failing to inform Mr. Kotofsky of the risk of HIV transmission associated with receiving a blood transfusion from unknown donors. More specifically, plaintiffs claim that defendants were negligent in failing to inform Mr. Kotofsky of the hospital's directed donor program whereby a patient may elect to have blood withdrawn prior to surgery or blood donated by family members available for transfusion. Defendants Albert Einstein Medical Center and Dr. Bell-Thompson now move to dismiss the complaint for failure to state a claim for which relief can be granted. For the following reasons, I will grant defendants' motion in part and deny it in part.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. In considering a motion to dismiss, I must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in plaintiffs' favor. I may consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case without converting a Rule 12(b)(6) motion into a motion for summary judgment. See Oshiver v. Levin. Fishbein, Sedran & Berman, 38 F.3d 1380, 1385, n. 2 (3d Cir. 1994). I may grant defendants' motion only if I conclude that plaintiffs would not be entitled to relief under any set of facts consistent with their allegations. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F. 3d 1250, 1261 (3d Cir. 1994).

In their motion to dismiss, defendants argue that the plaintiff's claims should be dismissed based on Pennsylvania's "Blood Shield" law, 42 P. S. § 8333, which states:

(a) General rule.--No person shall be held liable for death, disease or injury resulting

> from the lawful transfusion of blood, blood components or plasma derivatives, or from the lawful transplantation or insertion of tissue, bone or organs, except upon a showing of negligence on the part of such person. Specifically excluded hereunder is any liability by reason of any rule of strict liability or implied warranty or any other warranty not expressly undertaken by the party to be charged.
>
> (b) Definition.--As used in this section the term "negligence" shall include but not be limited to any failure to observe accepted standards in the collection, testing, processing, handling, storage, transportation, classification, labeling, transfusion, injection, transplantation or other preparation or use of any such blood, blood components, plasma derivatives, tissue, bone or organs.

Contrary to defendants' contention, this statute does not bar plaintiffs' claims. In this case, plaintiffs allege that defendants were negligent in failing to inform him of viable alternatives, such as the hospital's directed donor program, to using blood from unknown donors.

Defendants also argue that any claim based on lack of informed consent should be dismissed on either of two grounds. First, defendants contend that they had no duty under Pennsylvania law to obtain Mr. Kotofsky's informed consent prior to transfusing blood. Though defendants correctly note that prior to the state legislature's codification of the law of informed consent, see 40 P.S. § 1301.811-A (effective January 25, 1997), a patient's informed consent was not required for blood transfusions unless incident to surgery, Hoffman v. Brandywine Hosp., 443 Pa. Super. 245, 254, 661 A.2d 397, 401-02 (1995), they do not address the crux of plaintiffs' claims –that defendants voluntarily assumed a duty to obtain informed consent. Moreover, the transfusion at issue in this case occurred after surgery and thus was likely a direct consequence of the operation.

Second, defendants contend that a negligence-based informed consent claim does not constitute a viable cause of action. Under Pennsylvania law it is the doctor's duty-- not that of the hospital-- to obtain a patient's informed consent. Kelly v. Methodist Hosp., 444 Pa. Super. 427, 431-

33, 664 A.2d 148, 149-51 (1995). Allegations that a hospital was negligent in failing to establish adequate rules and policies relating to informed consent do not state a viable cause of action under state law. Id. However, this argument again fails to address the basis of plaintiffs' claims. Here, plaintiffs allege that defendants voluntarily assumed a duty to obtain Mr. Kotofsky's informed consent and that defendants failed to use reasonable care in performing this duty. At least one court within this district has found that such allegations state a viable claim. In Jones v. Philadelphia College of Osteopathic Medicine, 813 F. Supp. 1125 (E.D. Pa. 1993), the hospital undertook of its own volition, as is alleged here, to prepare a consent to blood transfusion form bearing its name and logo. Philadelphia College, 813 F. Supp. at 1131. The court held that allegations that the hospital had "gratuitously undertaken this obligation [to obtain a patient's informed consent] and therefore has a duty to make certain that the informed consent forms fully inform patients....of the risks associated with blood transfusion" may indeed state a valid cause of action. Id. As Judge Gawthrop explained in dicta analyzing Philadelphia College:

> This is but an example, in the medical context, of general negligence law concerning duty. One has, for example, no duty to drive one's neighbor to the airport. But if one nevertheless volunteers to undertake that good-neighborly task, and then drives negligently, causing the neighbor to be injured en route, one is held legally accountable.

Davis v. Hoffman, 972 F. Supp. 308, 312 (E.D. Pa. 1997). This element of general negligence law, as expressed in Section 323 of the Restatement (Second) of Torts, has long been part of the law of Pennsylvania.[3] Gradel v. Inoue, 491 Pa. 534, 541, 421 A.2d 674, 677 (1980). Since I cannot

---

[3] Restatement (Second) of Torts § 323 (1965) provides in relevant part:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting

conclude that plaintiffs would not be entitled to relief under any set of facts consistent with their allegations, I will allow these claims to go forward.

Finally, defendants assert that they cannot be held liable for failing to investigate and ensure that the blood received by Mr. Kotofsky was free from disease. In their response plaintiffs have conceded this argument and have agreed to withdraw any allegations that the moving defendants were negligent in failing to investigate whether blood used in the transfusion was safe. Accordingly, defendants motion with regards to such claims will be granted.

---

from his failure to exercise reasonable care to perform his undertaking, if
(a) his failure to exercise such care increases the risk of such harm, or
(b) the harm is suffered because of the other's reliance upon the undertaking.